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80-1144

NO. 80-

In the Supreme Court of the United States

October Term, 1980

RAUL GUTIERREZ,

Petitioner,

vs.

BOSTON OLD COLONY INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT, WHICH SUBSTITUTED THE COURT'S JUDGMENT FOR THAT OF THE JURY, DENIED PETITIONER HIS RIGHT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY ARBITRARILY DISREGARDING THE SUBSTANTIAL EVIDENCE OF BAD FAITH WHICH WAS BEFORE THE JURY AND WAS THE BASIS FOR THE JURY'S VERDICT AND THE DISTRICT COURT'S AFFIRMANCE.

LIST OF ALL PARTIES

The following is an inclusive list of all parties to the cause herein:

Raul Gutierrez, Petitioner
Boston Old Colony Insurance Company, Respondent.

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The opinion of the District Court of Appeal of Florida, Third District, which affirmed the final judgment of the circuit court, is reported as *Boston Old Colony Insurance Company v. Gutierrez*, 360 So.2d 464 (Fla. 3d DCA 1978), and dated July 11, 1978. The full decision is set forth in the Appendix at page 6.

The opinion of the Supreme Court of Florida, which quashed the decision of the district court and remanded the cause for further proceedings, is reported as *Boston Old Colony v. Gutierrez*, 386 So.2d 783 (Fla. 1980), and dated April 10, 1980, rehearing denied September 4, 1980. The full decision is set forth in the Appendix at page 1, and the Order Denying Rehearing is at page 11 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Florida was rendered on April 10, 1980. A timely Petition for Rehearing was denied on September 4, 1980. An extension of time to and including December 8, 1980 was granted by this Court, and the Petition was timely filed on December 8, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

A. The Fourteenth Amendment to the United States Constitution provides in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Article I, Section 22 of the Florida Constitution provides:

> The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

STATEMENT OF THE CASE[1]

On January 1, 1973, at approximately 6:00 P.M., Petitioner Raul Gutierrez and Boston Old Colony's insured, Bruce Brown, were involved in a head-on collision on West Flagler Street in Miami, Florida. An unusual circumstance of the accident was that both Brown and Gutierrez claimed to have been proceeding east on Flagler Street and that the other car was heading west on Flagler, crossed the center line and then collided head-on with his car.

There were three eyewitnesses to the accident who independently testified, both at the scene of the accident and subsequently at trial, that it was in fact Gutierrez who had been proceeding east on Flagler when Brown, who was traveling west, crossed the center line and struck Gutierrez' vehicle head on.[2] The investigating officer, after extensively viewing the scene and interviewing the three eyewitnesses, issued a citation charging Brown with causing the accident.[3]

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[1]The Statement of the Case is taken substantially from the district court decision of *Boston Old Colony Insurance Company v. Gutierrez*, 360 So.2d 464 (Fla. 3d DCA 1978), and supplemented by the use of footnotes where relevant. Although portions of the Statement utilize the exact language of the district court, for ease of reading quotation marks are not indicated nor will the court's language be single-spaced or indented.

[2]All three eyewitnesses were traveling eastward, in the same direction as Gutierrez. One was directly in front of Gutierrez, and the other two were directly behind him.

the three eyewitnesses, issued a citation charging Brown with causing the accident.[3]

Brown subsequently produced three witnesses of his own, although not eyewitnesses, who gave statements to his insurance company supporting Brown's version of the accident. The three individuals, friends of Brown's family, lived in a trailer park which was approximately two blocks west from the scene of the accident. They stated that Brown had been with them shortly before the accident and that when he drove out of the trailer park, they assumed he headed east on Flagler Street.[4]

Brown had a $10,000.00 liability policy and also an uninsured motorist policy with Boston Old Colony. Boston Old Colony was notified, and on January 2, the day following the accident, the case was assigned to George Heider, a senior adjuster for the company.[5]

Having reviewed the accident report, Heider knew there was a question of liability despite Brown's version of the accident, and he so stated in his file. Further,

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[3]Two highly-trained police homicide accident investigators arrived at the accident scene shortly after its occurrence. They conducted an investigation by establishing the point of impact, the skid marks, and the final resting place of both vehicles. Both independently concluded that Brown — not Gutierrez — had been traveling west, crossed the center line, and caused the collision.

[4]Interestingly, these alleged witnesses were not called upon to testify at the trial on bad faith.

[5]Heider, an experienced claims adjuster, had been in the business since 1964. He handled the case along with John Dinapoli, his claims supervisor, who had been an adjuster since 1957.

within two days of the accident Heider knew that Gutierrez's injuries were serious; he noted in his file that Gutierrez was in South Miami Hospital in the intensive care unit, listed in critical condition. On January 9, Heider learned that Gutierrez had suffered a fractured arm, thirteen fractured ribs, a fractured leg and was paralyzed from the waist down. Additionally, a tracheotomy had been performed so that Gutierrez was unable to talk.

Although Boston Old Colony denied any liability to Gutierrez's attorney, first on January 9th and again on February 12th, Heider, its adjuster, had in fact on January 18th set up a reserve of $9,500.00 on Brown's policy of $10,000.00. Heider had full authority to settle where there was a possibility of a verdict and judgment in excess of the $10,000.00 policy limits.[6]

On January 18th, Boston Old Colony engaged Mr. David Plummer, an accident reconstructionist, to investigate the physical evidence and to render an opinion as to which car had in actuality been traveling east.[7] After

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[6]In his field report of January 18, Heider assigned a negligence factor of 25% to his insured, Brown. Given the extensive injuries and necessary intensive hospital care of Gutierrez, it was apparent very shortly after the incident that even a 25% liability for Brown would well exceed the policy limits of $10,000.00.

[7]Boston Old Colony first contacted Mr. Delton Dollar, a well-known and highly respected accident reconstruction expert, to reconstruct the accident. Mr. Dollar disagreed with their version of the accident, however, and was thus not retained by them. Subsequently, counsel for Mr. Gutierrez engaged Mr. Dollar's services. Mr. Dollar investigated the facts of the accident and at trial testified that Mr. Gutierrez had been traveling east and Brown, traveling west, crossed the center line and caused the accident.

examining the accident site and the wrecked vehicles, a report was sent by Plummer to Heider on March 14th in which Plummer discussed the physical evidence and gave his opinion that Brown was eastbound and Gutierrez was westbound on Flagler Street and that Gutierrez had been on the wrong side of the pavement at the point of impact.[8]

Brown reported to Heider that he had employed a personal attorney, Malcolm Kneale, and was planning to make, and later did make, a claim for his own injuries.

Heider testified that because of the seriousness of Gutierrez's injuries and the conflict in liability testimony, he decided he would offer to pay the $10,000.00 policy limit to settle the Gutierrez claim. Before making the offer to Gutierrez, however, Heider again talked with Brown. Although there was nothing in the policy that gave Brown the right to approve or disapprove the settlement, Heider consulted with him because Heider knew that Brown was represented by personal counsel and was going to make claim for his own injuries.

According to Heider, Brown opposed offering any settlement to Gutierrez even though Heider alleged to have warned him of a possible excess verdict. Heider asked Brown to provide Old Colony with a hold harmless letter; the letter, dictated by Heider to Brown's attorney, Kneale, was signed by Brown on March 5, 1973.

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[8]To reach this conclusion Plummer theorized that the two vehicles collided slightly off center, causing them to each become airborne, revolve 180 degrees, and, upon returning to earth, create the skid marks and other evidence which suggested that Brown was at fault in causing the accident.

There was conflict in the testimony between Kneale and Heider as to the circumstances leading up to the hold harmless letter.[9] Kneale testified at trial that prior to the execution of the hold harmless letter, Heider had informed him that Gutierrez had no liability insurance. Kneale and Heider then discussed an uninsured motorist claim by Brown against Boston Old Colony. According to Kneale, Heider's position had been that Boston Old Colony would not "pay both ways;" that is, Boston Old Colony would pay either the uninsured motorist claim to Brown or would pay against Gutierrez's claim, but would not pay both. Kneale also testified that Heider told him that Brown's uninsured motorist claim would not receive favorable treatment unless the hold harmless letter was prepared, and that he was relying on Heider to make immediate settlement under the uninsured motorist claim.

In actuality, Gutierrez had a liability insurance policy with Government Employees Insurance Company (GEICO). Boston Old Colony was well aware, and had been since January 9, that Gutierrez carried liability insurance with GEICO. At no time during the discussion of Brown's uninsured motorist claim with Boston Old Colony did Heider indicate to Brown or his attorney, Kneale, that such coverage for Brown was unavailable because of the fact that Gutierrez was insured. To the contrary, Kneale testified that Heider had specifically told him Gutierrez had *no* liability insurance.

On March 14th, Gutierrez's attorney wrote Boston Old Colony offering to settle the claim against Brown

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[9]Brown did not testify at the second trial because for obvious reasons he could not be located.

and Boston Old Colony for the policy limits. On March 22nd, Heider, the adjuster, with the hold harmless letter in hand, wrote Gutierrez's attorney denying liability and refused any attempts to settle. Heider testified that at that time he would have paid the policy limits of $10,000.00 had he not obtained the hold harmless letter. On March 23rd, Heider sent Kneale, Brown's attorney, a copy of Gutierrez's letter of March 14th offering to settle for the policy limits.[10]

With no possibility of settlement, Gutierrez in April 1973 filed suit against Brown and Boston Old Colony in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, for damages sustained as a result of the January 1st collision.

Boston Old Colony engaged George Lanza, a Miami attorney, to defend Brown and Boston Old Colony. After reviewing the file and conducting initial interviews of witnesses, on two separate occasions[11] Lanza reported to Boston Old Colony that the case was bad and recommended settlement for the policy limits.[12] Although

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[10]The record reflects that at no time did Boston Old Colony advise Brown: (1) that settlement with Gutierrez would not constitute an admission of liability; (2) of the possible extent of the excess judgment that could issue against him; or (3) of the change of law that had occurred regarding comparative negligence.

[11]Testimony at trial revealed that Lanza contacted Boston Old Colony first on May 1 and again on June 12, advising settlement.

[12]Unable to convince Boston Old Colony to settle the case, Lanza began discovery and scheduled depositions of the three eyewitnesses. In anticipation of these depositions, he stated to Boston Old Colony in writing that his only recourse at that point was to try to "foul up the testimony of the eyewitnesses as to what actually occurred."

Lanza was not asked for his opinion on liability, he testified that, if asked, he would have stated that, without considering the damage factor, Gutierrez had a fifty-fifty possibility of recovery.

On June 13th, Brown filed a claim against Boston Old Colony under the uninsured motorist provision of his policy.[13] On July 11th, Heider wrote Brown's attorney that Gutierrez did, in fact, have insurance.[14]

Left with no other legal recourse, Kneale's law firm filed a counterclaim for Brown's damages in the collision. On November 13th, Gutierrez's attorney wrote Boston Old Colony a letter accusing it of bad faith and withdrawing the offer to settle for the policy limits. On December 27th Brown settled his counterclaim against Gutierrez's insurer for $5,000.00.

On the first day of trial on Gutierrez's claim against Brown — January 2, 1974 — Boston Old Colony *for the first time* offered to settle with Gutierrez for its policy limits. Gutierrez declined the offer,[15] the trial proceeded

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[13]The filing of this claim evidences Brown's ignorance of the fact that Gutierrez carried liability insurance — a fact known to Boston Old Colony since January 9.

[14]This was six months *after* the point in time that Heider first learned that Gutierrez was insured with GEICO.

[15]The fact that Gutierrez declined the settlement offer the day of trial, over one year from the date of the accident, was understandable in light of his extensive injuries, impaired future earnings, and extensive attorney's fees and costs incurred in preparation for trial — the vast portion of which would not be recouped by a $10,000.00 settlement.

on the merits, and the jury returned a verdict for Gutierrez in the amount of $1,418,350.16.[16]

Subsequent to that case, Gutierrez filed a second suit in circuit court against Boston Old Colony only, in which he charged that Boston Old Colony had acted in bad faith in refusing to settle his claim against Brown.[17] This claim was fully tried before a jury. The court received extensive testimony and, except for the testimony of Brown — who was nowhere to be found — the facts as set forth herein were fully explored.[18] Finding that Boston Old Colony had indeed acted in

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[16]Notably, Boston Old Colony did not appeal liability or damages at this time.

[17]Florida law is clear that a third party beneficiary to an insurance policy, such as Gutierrez was, has a cause of action directly against a tortfeasor liability insurer for recovery of a judgment in excess of the policy limits upon a claim of fraud or bad faith of the insurer in the conduct or handling of the suit. *See Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259 (Fla. 1971); *Auto Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938).

[18]At trial, Gutierrez had two experts review the facts of this case as they related to the issue of bad faith on the part of Boston Old Colony. Both Arthur Hawkesworth and Ray Dwyer were trial lawyers with extensive experience in insurance defense litigation, the evaluation and settlement of insurance claims, and the intricacies and legal theories in bad faith cases. Both Hawkesworth and Dwyer were of the opinion that Boston Old Colony's failure to settle Gutierrez's claim within policy limits when it had the opportunity to do so was a breach of its fiduciary obligation to its insured, Brown, and constituted bad faith under the facts of this case. Hawkesworth and Dwyer based their opinions on the severity of Gutierrez's injuries and the magnitude of his damages; the fact that policy limits were only $10,000.00; the physical and eyewitness

bad faith in failing to settle Gutierrez's claim against Brown, the jury returned its verdict for Gutierrez against Boston Old Colony in the amount of $1,418,350.16, with interest and costs.

Boston Old Colony appealed the judgment to the District Court of Appeal of Florida, Third District. The position of Boston Old Colony was three-fold: (1) the trial court had erred in refusing to grant Boston Old Colony's motion for a directed verdict;[19] (2) the law on bad faith of an insurer, as set forth in *Thompson v. Commercial Union Insurance Company of New York*, 250 So.2d 259 (Fla. 1971), was erroneous and should be receded from; and (3) the trial court had erred in refusing to instruct the jury upon the doctrine of avoidable consequences.

Declining to discuss the second position because the *Thompson* doctrine governed, the district court of

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(Footnote 18 continued)

evidence as to liability; the duty of the carrier to investigate and evaluate the claim as though there were no policy limits; the duty to settle the claim within the policy limits if there was a possibility of an excess verdict; and the repeated recommendations of Boston Old Colony's own lawyer to settle. Hawkesworth characterized the bad faith of Boston Old Colony as "unequivocal" and "open and shut." He believed that the hold harmless agreement extracted from Brown was a "flagrant" example of bad faith for the sole purpose of protecting Boston Old Colony at the expense of its insured.

[19]Boston Old Colony urged this point on the grounds that: (1) Brown had maintained at all times that he was not at fault, a position for which he had some evidence, albeit weak; (2) Brown's independent counsel prosecuted and recovered on a counterclaim against Gutierrez and expressly requested that the cause not be settled; and (3) after the settlement of Brown's counterclaim against Gutierrez, Boston Old Colony offered to settle for its policy limits.

appeal held that the record contained sufficient evidence to support the verdict despite the fact that Boston Old Colony had a request from its insured not to settle the Gutierrez claim. In *Boston Old Colony Insurance Company v. Gutierrez*, 360 So.2d 464 (Fla. 3d DCA 1978), the court reasoned:

> We are impressed with the testimony that the policy between Boston Old Colony and Brown left the insurance company free to exercise its own judgment as to settlement. Further, there is evidence which, if believed by the jury, could support Gutierrez's position that Brown's position and the hold harmless letter were procured without a full disclosure of facts known to Boston Old Colony. . . . *In this case, where there was evidence of less than open-handed dealings with the insured, we think that the submission of the cause to the jury cannot be said to be faulty as a matter of law.*

Id. at 467-68 (emphasis added).[20]

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[20]The court, in considering the third aspect of Boston Old Colony's argument for error upon the denial of its motions for a directed verdict in light of the offer to settle for the policy limits on the day of trial, observed:

> The jury in this case was fully informed of the offer to settle just prior to trial. The same jury found bad faith in the insurance company's dealing with its insured. . . . The jury verdict must be interpreted as finding that the belated offer to settle, made only after bad faith had been charged and Gutierrez's offer to settle had been withdrawn, reasonably resulted in the excess verdict. We cannot now say that if bad faith had occurred, as the jury found, that this bad faith was, as a matter of law, wiped out by the belated offer to settle.

360 So.2d 464, 468.

Boston Old Colony petitioned the Florida Supreme Court to review the decision of the district court, and the district court certified to the supreme court the following question:

> Does the law as enunciated in *Thompson v. Commercial Union Insurance Co.*, 250 So.2d 259 (Fla. 1971), authorize a bad faith action against an insurance company when that company has refused to settle a claim at the express direction of its own insured who obtains a settlement of his claim and the insurance company, thereafter offers to settle for its policy limits before trial?

The Florida Supreme Court accepted jurisdiction of the cause. Although answering the certified question in the affirmative, the court found that the evidence in the case before it was legally insufficient to show bad faith on the part of Boston Old Colony:

> We hold that under the facts of this case, *Thompson* does not require the result reached by the district court of appeal. *There is no sufficient evidence from which any reasonable jury could have concluded that there was bad faith on the part of the insurer.* The facts in *Thompson* are materially different from the facts now before us. In the present case, Brown, the insured, at all times contested liability and had evidence to support his position. Brown expressly requested Boston Old Colony not to settle the claim because he was pursuing a counterclaim against plaintiff Gutierrez. Brown executed a "hold harmless" agreement in which

> he assumed responsibility for any excess judgment. After settlement of Brown's counterclaim, prior to trial, Boston Old Colony offered to settle for policy limits. Unlike *Thompson*, where the insurer refused to settle at all times despite advice of its own counsel, here the insurer was ready to settle, expressed its willingness to settle, and only because of the explicit request of its own insured did not settle. Furthermore, in the present case, unlike *Thompson*, the plaintiff refused to settle when the insurer subsequently offered to settle prior to trial.

Boston Old Colony Insurance Company v. Gutierrez, 386 So.2d 783, 785-86 (Fla. 1980) (emphasis added).

In seeking review by this Court, Petitioner Gutierrez contends that the holding of the Florida Supreme Court is totally arbitrary and unsupported by the facts as presented to and determined by the jury, and therefore has the effect of denying Petitioner his right of due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and his right to trial by jury, as guaranteed by Article I, Section 22 of the Florida Constitution.

STATE OF PROCEEDINGS WHEREIN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The federal questions herein presented arose at the time the Supreme Court of Florida rendered its decision on April 10, 1980, wherein the court quashed the decision of the district court and remanded the

cause to the circuit court for further proceedings. Prior to that time there had been no denial of due process or denial of a trial by jury; these constitutional violations occurred by virtue of the holding of the Florida Supreme Court in *Boston Old Colony Insurance Company v. Gutierrez*, 386 So.2d 783 (Fla. 1980), and its adverse effect upon the Petitioner herein. As a result, this Petition for Writ of Certiorari is the first opportunity Petitioner has had to raise these constitutional issues.

It should nevertheless be noted that in his brief to the Florida Supreme Court, Petitioner addressed the constitutionality of an opinion which would be favorable to Boston Old Colony:

> To strip Gutierrez of his judgment against Boston Old Colony would be equivalent to *depriving him of property without due process of law* or to impairing a contractual obligation retroactively, both of which are proscribed by public policy; the Declaration of Rights of the Florida Constitution, and previous decisions of this Court.

Brief for the Respondent at 36 (served Oct. 16, 1978) (emphasis added).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE FLORIDA SUPREME COURT, WHICH SUBSTITUTED THE COURT'S JUDGMENT FOR THAT OF THE JURY, DENIED PETITIONER HIS RIGHT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES

CONSTITUTION BY ARBITRARILY DISREGARDING THE SUBSTANTIAL EVIDENCE OF BAD FAITH WHICH WAS BEFORE THE JURY AND WAS THE BASIS FOR THE JURY'S VERDICT AND THE DISTRICT COURT'S AFFIRMANCE

Petitioner Gutierrez contends that the decision by the Florida Supreme Court, in finding that there was insufficient evidence from which a reasonable jury could have concluded bad faith on the part of Boston Old Colony, serves to deny Petitioner his fundamental right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. This holding by the court is arbitrary, capricious, and flies in the face of substantial evidence in the record to the contrary.

Due process requires an orderly and objective review of the record by an appellate court to determine whether the decision of the lower tribunal was supported by competent substantial evidence. Just as it is a denial of due process for a state to convict a person without evidence of his guilt,[21] it is equally a denial of due process for a state to take away a person's property — in this case, a judgment for damages — by arbitrarily holding that there is insufficient evidence in the face of overwhelming evidence to the contrary.[22]

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[21] *Thompson v. City of Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960); *Jackson v. Virginia*, ___ U.S. ___, 99 S.Ct. 2781, ___ L.Ed.2d ___ (1979).

[22] *Hicks v. Oklahoma*, ___ U.S. ___, 48 U.S.L.W. 4724 (June 17, 1980); *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir. 1978).

Florida law is clear that reviewing courts may not sit as triers of fact or substitute their judgment and conclusions for those rendered below.[23] Appellate courts in Florida, therefore, are limited to reviewing errors of law and are not generally authorized to review questions of fact.[24] While a question as to sufficiency of the evidence as a matter of law may be presented to the reviewing court, the court is bound by the judgment below so long as there is some substantial evidence to support the judgment.[25]

This type of review was afforded by the district court in its review of the judgment herein, but was subsequently denied by the Florida Supreme Court. Contrary to established principles of law, the Florida Supreme Court reweighed the evidence pertaining to bad faith by disregarding substantial evidence of bad faith that was presented to the jury through the testimony of numerous witnesses and the evidence of various documents of Boston Old Colony. The court's holding that there was "no sufficient evidence from which any

[23]*Westerman v. Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972); *Greenwood v. Oates*, 251 So.2d 665 (Fla. 1971); *Edwards v. Doherty*, 74 So.2d 686 (Fla. 1954).

[24]*Community Blood Bank, Inc. v. Russell*, 196 So.2d 115 (Fla. 1967); *Fryer v. Industrial Fire and Casualty Ins. Co.*, 339 So.2d 285 (Fla. 3d DCA 1976).

[25]*Southern Convalescent Home v. Wilson*, 285 So.2d 404 (Fla. 1973); *Myers v. Atlantic Coastline Railway Co.*, 112 So.2d 263 (Fla. 1959); *Hopkins v. Tallahassee*, 105 So.2d 770 (Fla. 1958); *Smith Engineering and Constr. Co. v. Cohn*, 94 So.2d 826 (Fla. 1957); *Williams v. Smelt*, 83 So.2d 1 (Fla. 1955).

of numerous witnesses and the evidence of various documents of Boston Old Colony. The court's holding that there was "no sufficient evidence from which any reasonable jury could have concluded that there was bad faith on the part of the insurer" cannot be reconciled with the evidence in this cause.

The district court of appeal, in affirming the judgment in favor of Gutierrez, noted that there was "evidence of less than open-handed dealings with the insured." Specifically, the district court identified the following evidence as support for the jury verdict:

> We are impressed with the testimony that the policy between Boston Old Colony and Brown left the insurance company free to exercise its own judgment as to settlement. Further, there is evidence which, if believed by the jury, could support Gutierrez's position that Brown's position and the hold harmless letter were procured without a full disclosure of facts known to Boston Old Colony.

360 So.2d at 467-68.

In contrast, the decision of the Florida Supreme Court mentions neither the fact that the insurance policy expressly provided that Boston Old Colony was free to settle a case despite objections from the insured or that evidence suggested the hold harmless letter had been procured from Boston Old Colony without a full disclosure of facts known to it. Rather than viewing the evidence in the light most favorable to the prevailing party as required by state and federal law,[26] the supreme court appears to have accepted as true the statements

made by Boston Old Colony in its brief, without any independent review or verification of the record itself.

. . . . .

As the district court correctly concluded, "the record contains sufficient evidence to support the verdict" — evidence which the supreme court arbitrarily chose to disregard, ignore or overlook. Briefly, the record supports the jury's verdict and finding of bad faith in the following respects:

1. It was evidence of bad faith to disregard the testimony of three impartial eyewitnesses, two police officers who investigated the scene of the accident, and one expert witness, Mr. Delton Dollar, and accept instead the testimony of Brown's three family friends and the expert retained by him.[27]

2. It was evidence of bad faith for Boston Old Colony to deceive Brown into believing that Gutierrez had no insurance and that he would receive money from Boston Old Colony from his uninsured motorist claim.[28]

3. It was evidence of bad faith for Boston Old Colony to induce Brown into executing the hold harmless letter on the belief that Brown would be able to recover on his uninsured motorist claim.

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[26]*See, e.g., Koch v. Secretary of Dep't of Health, Educ. & Welfare*, 590 F.2d 260 (8th Cir. 1978); *Seifert v. Solem*, 387 F.2d 925 (7th Cir. 1967); *Schultz & Lindsay Constr. Co. v. Erickson*, 352 F.2d 425 (8th Cir. 1965); *City of West Plains, Missouri v. Loomis*, 279 F.2d 564 (8th Cir. 1960); *Herzog v. Herzog*, 346 So.2d 56 (Fla. 1977); *Greenwood v. Oates*, 251 So.2d 665 (Fla. 1971); *Re Estate of Thompson*, 84 So.2d 911 (Fla. 1955); *Loew v. Friedman*, 87 So.2d 672 (Fla. 1955); *Merek v. Patterson*, 75 So.2d 808 (Fla. 1954).

4. It was evidence of bad faith to induce Brown into believing that Boston Old Colony's settlement with Gutierrez constituted an admission of guilt and would preclude recovery of Brown's claim.

5. It was evidence of bad faith to obtain the hold harmless agreement from Brown because it deliberately served to insulate Boston Old Colony and to expose its insured, Brown, to excess liability.

6. It was evidence of bad faith to disregard the advice of Boston Old Colony's privately-retained counsel, who on two separate occasions advised that the company pay the $10,000.00 policy limit to Gutierrez.[29]

7. It was evidence of bad faith not to pay the policy limits when the damages far exceeded the policy limits.

8. It was evidence of bad faith, where, as here, the insurer was gambling with a far greater portion of the insured's financial risk than its own.[30]

In light of the above identified evidence, it is difficult

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[27]*See, e.g., Klingman v. National Indemnity Co.*, 317 F.2d 850 (7th Cir. 1963). In *Klingman*, the Seventh Circuit Court of Appeals noted:

> Under some circumstances, in order to act in good faith, an insurer may be required to disbelieve its insured.

Id. at 854.

[28]*See Campbell v. Government Employees Ins. Co.*, 306 So.2d 525 (Fla. 1974).

to understand how the court could conclude that the evidence presented to the jury was "legally insufficient" to show bad faith on the part of Boston Old Colony. An analysis of this decision of the Florida Supreme Court reveals the following inconsistencies with the facts presented at trial:

1. The supreme court failed to note that the three eyewitnesses at the accident all independently testified that Brown, not Gutierrez, had been traveling west and had caused the accident.

2. The court places much emphasis on the fact that Boston Old Colony's reconstruction expert concluded that Gutierrez was at fault. The court fails to note that the first reconstruction expert contacted by Boston Old Colony, Delton Dollar, subsequently testified for and in favor of Gutierrez.

3. The court completely misinterprets and mistates the facts leading up to execution of the hold harmless agreement. In the court's words:

> Brown was opposed to a settlement. He had counterclaimed against Gutierrez for his own injuries and apparently did not want to make

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[29]*See, e.g., American Mutual Liability Ins. Co. v. Cooper*, 61 F.2d 446 (5th Cir. 1932); *Maryland Casualty Co. v. Elmira Coal Co.*, 69 F.2d 616 (8th Cir. 1934); *Thompson v. Commercial Union*, 250 So.2d 259 (Fla. 1971).

[30]*Baxter v. Royal Indemnity Co.*, 285 So.2d 652 (Fla. 1st DCA 1973); *Springer v. Citizens Casualty Co.*, 246 F.2d 123 (5th Cir. 1957); *Liberty Mutual Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969).

> the admission of fault implied by an offer to settle. So Boston Old Colony asked for, and Brown executed, a "hold harmless agreement", in which Brown assumed responsibility for any excess judgment.

386 So.2d at 784.

The sequence of events and rationale therefore are in error. Testimony of Mr. Kneale, Brown's attorney, revealed that Brown was induced to execute the hold harmless agreement because he believed that he would be unable to recover from Boston Old Colony on his uninsured motorist policy without such an agreement. This inducement occurred despite the fact that Boston Old Colony had been aware since January that Gutierrez in fact had liability insurance and that Brown would not be able to recover under the uninsured motorist provision of his policy.

Brown executed the hold harmless letter on March 5, 1973. *It was not until one month later,* in April, *that Gutierrez sued Brown* for his damages. On June 13, 1973, Brown submitted his claim to Boston Old Colony for reimbursement pursuant to his unemployed motorist coverage. It was not until *after* Boston Old Colony informed Brown that he could not recover under that provision that Brown then counterclaimed against Gutierrez in circuit court.

The sequence of events of the hold harmless letter is highly relevant to the issue of bad faith on the part of Boston Old Colony, in that: (1) Boston Old Colony induced Brown to execute the hold harmless agreement on the mistaken belief that he would be able to recover

under the uninsured motorist provision of his policy – a mistaken belief deliberately given him by Boston Old Colony; and (2) by inducing Brown to execute the hold harmless agreement, Boston Old Colony intentionally exposed him to a substantial excess judgment over and above the $10,000.00 policy limits.

4. While the court notes that Boston Old Colony offered Gutierrez the policy limits in settlement after Brown's counterclaim was no longer pending, the court fails to note that said offer was made on the day of the trial – and by that time Gutierrez had incurred substantial medical expenses, loss of earnings, and attorneys' fees and costs well in excess of the $10,000.00 policy coverage.

In its opinion, the court discusses three obligations of an insurance carrier, and then concludes that "[t]he evidence presented in the present case demonstrates that Boston Old Colony fulfilled all these obligations." 386 So.2d at 785. To the contrary, the evidence in the record which was presented to the jury – and which the jury rightfully chose to believe – demonstrates that Boston Old Colony in fact scorned these obligations and acted in total disregard to them.

First, the court stated, an insurer has the duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. This includes the duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. *Id.* at 785. Testimony given at trial, however, strongly suggested that Boston Old Colony did not act in good faith and with due regard for the interests of its insured, Brown. Rather, Boston Old Colony

intentionally led Brown to believe that he would be able to recover under his uninsured motorist policy — when, in fact, Boston Old Colony had known since January that Gutierrez had insurance and this remedy was therefore not available to Brown. As Kneale, Brown's lawyer, testified at trial, Boston Old Colony's position to Brown was that it would not pay both ways: it would either pay the uninsured motorist claim to Brown or would pay Gutierrez's claim, but would not pay both. Kneale further testified that Boston Old Colony had told him that Brown's uninsured motorist claim would not receive favorable treatment unless the hold harmless letter was prepared. By inducing Brown to execute the hold harmless agreement, Boston Old Colony virtually insulated itself from liability and subjected only Brown to the excess judgment. In fact, at the time of the execution of the hold harmless agreement in March, it was apparent that Gutierrez's injuries were so substantial as to have already surpassed the $10,000.00 policy coverage.

Second, the court stated, the good faith duty of an insurer obligates it to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment and to advise the insured of any steps he might take to avoid same. *Id.* at 785. Yet there was no testimony presented to the jury which indicated that Boston Old Colony had ever undertaken to advise Brown as to those matters, nor does the court make reference to any such testimony in the record.

Third, the court stated, the insurer must investigate the facts, give consideration to a settlement offer that

is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. *Id.* at 785. Boston Old Colony knew that the liability for an automobile accident which rendered Gutierrez paraplegic would unquestionably be high, and would far exceed the policy coverage of $10,000.00. Because of its devious manueverings to extract the hold harmless letter from Brown, Boston Old Colony obviously never considered what it would do if faced with the prospect of paying the total recovery in this cause.[31]

The court contrasted the factual situation of *Thompson v. Commercial Union Insurance Company of New York*, 250 So.2d 259 (Fla. 1971), with the facts in this case before it, and concluded that the "facts in *Thompson* are materially different from the facts now before us." *Id.* at 785. The court perceived the differences between *Thompson* and the instant case to be as follows:

1. *"In the present case, Brown, the insured, at all times contested liability and had evidence to support his position."*

Brown contested liability only because he had been led to believe by Boston Old Colony that he would be paid on his uninsured motorist claim only if he were not liable for the accident. The fact is that when Gutierrez's insurance company settled Brown's counterclaim prior to trial for $5,000.00, Brown at that

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[31]*See Brown v. U.S. Fidelity & Guaranty Co.*, 314 F.2d 675 (2d Cir. 1963); *Bell v. Commercial Ins. Co.*, 280 F.2d 514 (3d Cir. 1960); *Coleman v. Holecek*, 542 F.2d 532 (10th Cir. 1976).

point directed Boston Old Colony also to settle. The only evidence that Brown had to support his position of non-liability was the testimony of three witnesses, who were friends of the family and not eyewitnesses, as to their "assumptions," and the testimony of the accident reconstructionist hired by Boston Old Colony after the first reconstructionist contacted by them, Delton Dollar, reported that Brown was in fact responsible for the accident.

2. *"Brown expressly requested Boston Old Colony not to settle the claim because he was pursuing a counterclaim against Plaintiff Gutierrez."*

This is an inaccurate misstatement of the facts of this case. As previously discussed, Brown did not file his counterclaim against Gutierrez until after his claim pursuant to the uninsured motorist policy had been denied.

3. *"Brown executed a 'hold harmless' agreement in which he assumed responsibility for any excess judgment."*

The record reflects that this agreement was frauduently induced by Boston Old Colony for the sole purpose of insulating it from additional liability in what was obviously a case involving substantial damages.

4. *"After settlement of Brown's counterclaim, prior to trial, Boston Old Colony offered to settle for policy limits."*

This offer came to Gutierrez on the day of trial, approximately one year from the date of the accident.

Clearly his damages far exceeded the $10,000.00 policy limit — as the jury so correctly found in awarding him $1,418,350.16 .

5. *"Unlike Thompson where the insurer refused to settle at all times despite advice of its own counsel, here the insurer was ready to settle, expressed its willingness to settle, and only because of the explicit request of its own insured, it did not settle."*

Testimony at trial revealed that Boston Old Colony was not only not willing to settle, but was not even willing to negotiate in the early stages of this case. As attorney Lanza testified at trial, subsequent to his involvement in the case he recommended to Boston Old Colony on two separate occasions that they settle the case for the policy limits, because the facts supported Gutierrez's claim and the damages were going to be heavy.[32] When informed by Boston Old Colony that they would not settle, Lanza informed the company that his only hope was to "foul up" the testimony of the eyewitnesses as to what actually happened.

6. *"Furthermore in the present case, unlike Thompson, the plaintiff refused to settle when the insurer subsequently offered to settle prior to trial."*

Gutierrez rightfully refused to settle at the time of the first offer, on the day of the trial, because his damages far exceeded the $10,000.00 policy limit.

In sum, contrary to being "materially different" from the facts in *Thompson*, the case herein is completely analogous and similar to the *Thompson* case.

A reading of the supreme's court opinion, when contrasted with the opinion of the district court of appeal, suggests that the court, in total contravention to case law, viewed the facts herein in the light most

favorable to the *non*-prevailing party, Boston Old Colony. Nowhere in the court's opinion is there discussion of the substantial testimony given by Gutierrez's two expert witnesses, Arthur Hawkesworth and Ray Dwyer, on the issue of bad faith. Although the testimony existed and was given to the jury, the court gave it no credence whatsoever.[33] This clearly amounts to a "weighing of the evidence" – which appellate courts are strictly prohibited from doing.

The effect of the supreme's court ruling is to deny Petitioner his right to a trial by jury by substituting its judgment for that of the jury. Only if there were *no* evidence of bad faith in the record below would the court's ruling be proper; however, as demonstrated herein, there was substantial evidence of bad faith of the insurer, Boston Old Colony. The jury so found, the district court of appeal correctly acknowledged, yet the Florida Supreme Court dismissed such evidence as being insufficient or non-existent.

The total effect of this ruling is to deny Petitioner his right to due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

This case is the converse of the cases of *Thompson v. Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624 (1960), and *Jackson v. Virginia*, ___ U.S.___, 99 S.Ct. 2781

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[32]*See Springer v. Citizens Casualty Co.*, 246 F.2d 123 (5th Cir. 1957).

[33]*See Government Employees Ins. Co. v. Grounds*, 311 So.2d 164 (Fla. 4th DCA 1975).

(1979). In both *Thompson* and *Jackson*, the United States Supreme Court held that it was a denial of due process for a state to take away a person's liberty in the absence of sufficient evidence supporting a conviction. It follows, therefore, that it is equally a denial of due process for a state to take away a person's property in the absence of sufficient evidence to do so.

In the case sub judice, the Supreme Court of Florida has denied the Petitioner due process of law by taking away his property in the absence of sufficient evidence. As grounds for its decision, the court states that there was insufficient evidence to support a finding of bad faith by the jury. As delineated herein, however, there was not only sufficient evidence to support the jury verdict, the evidence was overwhelming and virtually uncontradicted on major points, such as the bad faith evidenced by Boston Old Colony's inducement of Brown to execute the hold harmless letter. For the highest court of this state to disregard the substantial evidence presented at trial and to view the record in a light most favorable to Boston Old Colony, the non-prevailing party, amounts to an arbitrary and capricious denial of Petitioner's due process right.

It cannot be said that, because this case involves state action by a state court, no federal right exists or no federal right has been violated. Case law is clear that when a state acts arbitrarily in violation of its own rules, a violation of federal law will be found to have occurred.

In *Hicks v. Oklahoma*, ____ U.S. ____, 48 U.S.L.W. 4724 (June 17, 1980), the United States Supreme Court opined:

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz v. Nebraska Penal Inmates*, __ U.S. ____ (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek v. Jones*, ___ U.S. ___, citing *Wolff v. McDonnell*, 418 U.S. 539; *Greenholtz v. Nebraska Penal Inmates, supra* at ___; *Morrissey v. Brewer*, 408 U.S. 471. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

48 U.S.L.W. at 4725 (footnote omitted).

Similarly, in the case at bar, Florida law provides that reviewing courts may not sit as triers of fact or substitute their judgment or conclusions for those of the trial court. Rather, Florida appellate courts are required to view the evidence in the light most favorable

to the prevailing party; where any evidence can be said to exist in support of the judgment, the court is bound thereby and must affirm the judgment. Yet the Supreme Court of Florida in reviewing this cause did exactly the opposite, in flagrant violation of its own rules. The court reweighed the evidence below and took that evidence in the light most favorable to the non-prevailing party. The sum effect of such arbitrary state action is to deny Petitioner his property in violation of the Fourteenth Amendment.

While the full parameters of a state's arbitrariness have yet to be defined by the United States Supreme Court, at least one circuit has held that a state court's refusal to allow a defendant to present evidence to a jury relating to his defense is a denial of due process of law. In *Hughes v. Mathews*, 576 F.2d 1250 (7th Cir. 1978), the Seventh Circuit Court of Appeals considered whether a state court's exclusion of psychiatric testimony in a murder prosecution where a defendant's defense was that he lacked the specific intent required for a first degree murder conviction served to deprive the defendant of presenting his defense and thereby denied him due process of law. The court held that such testimony was indeed relevant and competent, and its arbitrary exclusion deprived defendant his right to due process of law:

> . . . [T]he right of a defendant to present evidence is a right which has independent status under the sixth and fourteenth amendments.
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> . . . . .
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> . . . What we have done is to recognize that a state may not relieve the prosecution of its duty to prove all elements of the crime charged beyond a reasonable doubt by improper use of presumptions. We have also recognized the

> due process right of the defendant to present relevant and competent evidence in the absence of a valid state justification for excluding such evidence. Upon the particular facts of this case, we find Wisconsin's justifications to be inapplicable.

Id. at 1255, 1259.

It follows, therefore, that the Florida Supreme Court's arbitrary denial that substantial competent evidence existed to support a finding of bad faith similarly amounted to a denial of due process of law. In *Hughes*, the state refused to allow the defendant to introduce relevant evidence essential to his case. In the instant case, while Gutierrez was permitted to present substantial evidence at trial in support of his allegation of bad faith on the part of Boston Old Colony, the Supreme Court of Florida has arbitrarily disregarded this evidence — and the ultimate denial of due process here is identical to that identified by the Seventh Circuit in *Hughes*.

CONCLUSION

The decision by the Supreme Court of Florida, which held that there was no sufficient evidence from which any reasonable jury could have found bad faith on the part of Boston Old Colony, had the effect of denying Petitioner his right of due process of law by arbitrarily ignoring the evidence presented at trial. Not only was the evidence demonstrating bad faith in refusing to settle substantial, it was overwhelming — and properly convinced a jury and the reviewing district court of appeal.

The district court correctly identified evidence in the record relating to bad faith which, as the jury found, was competent and substantial to support a

verdict of bad faith. To allow the highest court of this state to ignore the overwhelming weight of the evidence and to substitute its judgment for that of the jury mocks the very process of trial by jury and unconstitutionally denies Petitioner due process of law.

Accordingly, Petitioner requests this Court to issue a Writ of Certiorari to the Supreme Court of Florida, instructing it to quash its decision and reinstitute the decision of the district court of appeal.

Respectfully submitted,

SIMON, SCHINDLER & TRIPP, P.A.
1492 South Miami Avenue
Miami, Florida 33130
Tel: (305) 358-8611

By: /s/
TOBIAS SIMON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was hand-delivered to JAMES E. TRIBBLE, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl, Attorneys for Petitioner Boston Old Colony Insurance Company, at 2400 First Federal Building, One Southeast Third Avenue, Miami, Florida 33131, and was filed by U.S. Mail with the CLERK OF THE SUPREME COURT OF THE UNITED STATES, First and Maryland Avenue, N.E., Washington, D.C. 20543, pursuant to Supreme Court Rule 28.2, by depositing it in a United States Post Office, Return Receipt Requested, with first-class postage prepaid, this 8th day of December, 1980.

/s/
TOBIAS SIMON

Appendix

APPENDIX

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Boston Old Colony Co. v. Gutierrez, 386 So.2d (Fla. 1980)..... App. 2

Boston Old Colony Insurance Co. v. Gutierrez, 360 So.2d 464 (Fla. 3d DCA 1978)..... App. 13

Florida Supreme Court Order dated September 4, 1980, denying Petition for Rehearing..... App. 24

BOSTON OLD COLONY INSURANCE COMPANY, Petitioner,

v.

Raul GUTIERREZ, Respondent.

No. 54769.

Supreme Court of Florida.

April 10, 1980.

Rehearing Denied Sept. 4, 1980.

Individual who had been injured in motor vehicle collision with insured and who obtained judgment against him brought action against the latter's automobile insurer alleging bad faith because of failure to settle within policy limits. The Circuit Court, Dade County, Donald E. Stone, J., rendered judgment against insurer. The District Court of Appeal affirmed, 360 So.2d 464, and question was certified. The Supreme Court held that automobile insurer did not act in bad faith so as to be subject to liability for personal injury judgment in excess of policy limits where insured expressly requested insurer not to settle because he was pursuing a counterclaim against tort plaintiff, insured executed "hold harmless" agreement assuming responsibility for excess judgment and after settlement of counterclaim prior to trial insurer offered to settle for policy limits, which offer was refused by plaintiff.

Decision of district court quashed and cause remanded for new proceedings.

Alderman, J., concurred specially with an opinion, with which McDonald, J., concurred.

Adkins and Boyd, J.J., dissented.

1. Insurance —514.5(1)

In some circumstances, the *Thompson* rule may authorize a bad-faith action by an injured party against a tort-feasor's insurer when the insurer has refused to settle the claim at the express direction of the insured who obtains a settlement of his own claim and the insurer thereafter offers to settle for policy limits before trial. (Per curiam opinion of three Judges with two Judges concurring specially.)

2. Insurance —514.2

An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business.

3. Insurance —514.2

When an insured has surrendered to the insurer all control over the handling of the claim, including all decisions with respect to litigation and settlement, the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured.

4. Insurance —514.2

The duty of good faith obligates an insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment and to advise the insured of any steps he might take to avoid same.

5. Insurance —514.2

An insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

6. Insurance —514.2

Since the duty of good faith involves diligence and care in the investigation and evaluation of claims against the insured, negligence is relevant to the question of the insurer's good faith.

7. Insurance —514.5(3)

Question of insurer's failure to act in good faith with due regard for the interests of the insured in the handling of claims against him is for the jury.

8. Insurance —514.4

Automobile insurer did not act in bad faith so as to be subject to liability for personal injury judgment in excess of policy limits where insured expressly requested insurer not to settle because he was pursuing a

counterclaim against tort plaintiff, insured executed "hold harmless" agreement assuming responsibility for excess judgment and after settlement of counterclaim prior to trial insurer offered to settle for policy limits, which offer was refused.

9. Insurance —514.3

An insurer cannot escape liability for breach of duty of good faith by acting on what it considers to be its interests alone; an insurer with control over defense and settlement must at all times act in good faith, and it may not insulate itself from a bad-faith excess judgment by simply obtaining a hold harmless agreement from the insured.

James E. Tribble of Blackwell, Walker, Gray, Powers, Flick & Hoehl, Miami, for petitioner.

Murray Sams, Jr. and Francis W. Sams of Sams, Gerstein & Ward, Miami, for respondent.

PER CURIAM.

[1] We have for review the decision of the District Court of Appeal, Third District, in *Boston Old Colony Ins. Co. v. Gutierrez*, 360 So.2d 464 (Fla.3d DCA 1978). That court has certified the following question as passing upon a question of great public interest: "Does the law as enunciated in *Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259 (Fla.1971), authorize a bad faith action against an insurance company when that company has refused to settle a claim at the express direction of its own insured who obtains a settlement of his claim and the insurance company thereafter offers

to settle for its policy limits before trial?" Although we hold that *Thompson* may, in some circumstances, authorize such a suit, we find the evidence in this case legally insufficient to show bad faith on the part of Boston Old Colony Insurance Company.

Brown and Gutierrez were involved in a head-on collision. Both men claimed that they had been travelling east and that the other's car, headed west, crossed the center line of the highway and caused the collision. The officer who investigated at the scene concluded that Brown was responsible. Gutierrez brought an action against Brown for his injuries which action was defended by Brown's liability insurance carrier, Boston Old Colony. Brown's liability policy covered him up to a limit of $10,000.

In view of Brown's version of the facts and some corroborating evidence, Boston Old Colony retained an accident reconstruction expert. The expert examined the accident site and the wrecked vehicles and concluded that Brown's account was correct, that Gutierrez was west-bound and on the wrong side of the road at the point of impact.

Despite this favorable expert opinion evidence, Boston Old Colony's adjustor knew there was a question of liability. He knew also that Gutierrez's injuries were extensive and that there was a possibility of an excess judgment. He warned Brown of these matters and suggested an offer to settle for the policy limits. Brown was opposed to a settlement. He had counterclaimed against Gutierrez for his own injuries and apparently did not want to make the admission of fault implied by an offer to settle. So Boston Old Colony asked for, and

Brown executed, a "hold harmless" agreement, in which Brown assumed responsibility for any excess judgment.

Before the trial, with the claim and the counterclaim pending, Gutierrez offered to take the policy limits in settlement of his claim against Brown. Boston Old Colony responded by denying liability. Subsequently, Brown reached a settlement of his counterclaim against Gutierrez and his insurer. With the counterclaim no longer pending, Boston Old Colony offered Gutierrez the policy limits in settlement. By this time, however, Gutierrez preferred to proceed to trial. The trial resulted in a judgment for Gutierrez against Brown for $1,400,000. Gutierrez then brought the present action against Boston Old Colony, alleging bad faith on the part of the insurance company because of its failure to settle the claim for the policy limits when it had the opportunity. Gutierrez prevailed and obtained a judgment against Boston Old Colony for $1,400,000.

On appeal, Boston Old Colony argued that its motion for a directed verdict should have been granted since the evidence showed that Brown at all times contested liability and had evidence to support his position; that he requested that his insurer not settle the suit since he was pursuing his counterclaim against Gutierrez; and that after settlement of the counterclaim, Boston Old Colony offered the policy limits before trial. The district court affirmed, holding that there was sufficient evidence upon which a jury could base a verdict of bad faith failure to settle.

Boston Old Colony contends that Gutierrez, the injured tort plaintiff, should not be allowed to bring this action directly against it for its alleged bad faith in

failing to settle his claim against Brown, its insured. We previously rejected a similiar contention in *Thompson v. Commercial Union Ins. Co. of New York.* The fact that such an action may be brought does not mean, however, that Gutierrez is entitled to an excess judgment. He must first establish by legally sufficient evidence that the insurance company acted in bad faith.

[2-7] This brings us to Boston Old Colony's second contention that there was no evidence sufficient to support the jury's finding of liability for bad faith in not settling the claim. An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. *Auto Mutual Indemnity Co. v. Shaw,* 134 Fla. 815, 184 So. 852 (1938). For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. *Liberty Mutual Ins. Co. v. Davis,* 412 F.2d 475 (5th Cir. 1969). This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. *Ging v. American Liberty Ins. Co.,* 423 F.2d 115 (5th Cir. 1970). The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. *Government Employees Ins. Co.*

v. Grounds, 311 So.2d 164 (Fla. 1st DCA 1975), *cert. discharged*, 332 So.2d 13 (Fla.1976); *Government Employees Ins. Co. v. Campbell*, 288 So.2d 513 (Fla. 1st DCA 1973), *quashed*, 306 So.2d 525 (Fla.1974); *Baxter v. Royal Indemnity Co.*, 285 So.2d 652 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d 725 (Fla.1975). Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith. *American Fidelity and Casualty Co. v. Greyhound Corp.*, 258 F.2d 709 (5th Cir. 1958); *DeLaune v. Liberty Mutual Ins. Co.*, 314 So.2d 601 (Fla. 4th DCA 1975). The question of failure to act in good faith with due regard for the interests of the insured is for the jury. *Campbell v. Government Employees Ins. Co.*, 306 So.2d 525 (Fla.1974).

[8] The evidence presented in the present case demonstrates that Boston Old Colony fufilled all these obligations. We hold that under the facts of this case, *Thompson* does not require the result reached by the district court of appeal. There is no sufficient evidence from which any reasonable jury could have concluded that there was bad faith on the part of the insurer. The facts in *Thompson* are materially different from the facts now before us. In the present case, Brown, the insured, at all times contested liability and had evidence to support his position. Brown expressly requested Boston Old Colony not to settle the claim because he was pursuing a counterclaim against plaintiff Gutierrez. Brown executed a "hold harmless" agreement in which he assumed responsibility for any excess judgment. After settlement of Brown's counterclaim, prior to trial, Boston Old Colony offered to settle for policy limits. Unlike *Thompson*, where the insurer refused to settle

at all times despite advice of its own counsel, here the insurer was ready to settle, expressed its willingness to settle, and only because of the explicit request of its own insured did not settle. Furthermore, in the present case, unlike *Thompson*, the plaintiff refused to settle when the insurer subsequently offered to settle prior trial.

[9] By way of caveat, we point out that the "hold harmless" agreement in this case was *not* a determining factor in our decision. An insurer cannot escape liability for breach of the duty of good faith by acting upon what it considers to be its interest alone. An insurer with control over defense and settlement must at all times act in good faith, and it may not insulate itself from a bad faith excess judgment by simply obtaining a hold harmless agreement from its insured.

Accordingly, we hold that Boston Old Colony's motion for a directed verdict should have been granted, and we quash the decision of the district court. This cause is remanded for further proceedings consistent herewith.

It is so ordered.

ENGLAND, C. J., and OVERTON, SUNDBERG and McDONALD, J.J., concur.

ALDERMAN, J., concurs specially with an opinion, with which McDONALD, J., concurs.

ADKINS and BOYD, J.J., dissent.

ALDERMAN, Justice, concurring specially.

I concur with the Court's decision that the evidence in this case is insufficient to support the jury's verdict.

I concur specially to express my dissatisfaction with the rule of law announced in *Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259 (Fla.1971). I believe an injured tort plaintiff should not be allowed to bring an action directly against a tortfeasor's insurer for bad faith failure to settle a claim because, in my opinion, the insurer's good faith duty to settle runs only to its insured. Merely because an injured party becomes a third party beneficiary under an insurance policy does not entitle that party to invoke all the provisions of the insurance contract or statutes which govern the rights and duties between insurer and insured. *Wilder v. Wright*, 278 So.2d 1 (Fla.1973).

In the "Alice-in-Wonderland" world created by the *Thompson* rule, it is to the injured party's benefit if the insurer breaches its duty to its insured and to his detriment if there is no breach. This is so since, if the insurer settles, the plaintiff will receive more than the policy limits, but if it does not, the plaintiff may end up with both the policy limits and an excess judgment.

Judge Carroll, in *Canal Insurance Company of Greenville, South Carolina v. Sturgis*, 114 So.2d 469 (Fla. 1st DCA 1959), *aff'd*, 122 So.2d 313 (Fla.1960), clearly perceived the illogic of allowing an injured third party to maintain a direct action against the insurer for failure to settle when he said:

> No one can today question the legal right of the *insured* to sue the insurer for negligence or bad faith in failing to settle a claim within

> the policy limits for, if he has had to pay a part of the judgment, he has indeed suffered damages because of such failure of the insurer; but, when the judgment creditor directly so sues the insurer for an amount above such limits, a vastly different situation exists in the eyes of the law. The judgment creditor has not suffered because of the insurer's failure, but has, if anything, gained thereby. The judgment creditor would be in an anomalous position, for typically he would be claiming damages for the insurer's failure to settle the case for much less than the verdict he himself actually won.

114 So.2d at 471. Far from encouraging settlement of controversies, which *Thompson* said would result from a rule permitting direct suits, the *Thompson* rule induces a plaintiff, as in this case, not to settle.

McDONALD, J., concurs.

BOSTON OLD COLONY INSURANCE COMPANY, a foreign corp., Appellant,

v.

Raul GUTIERREZ, Appellee.

Nos. 77-508, 77-761.

District Court of Appeal of Florida, Third District.

July 11, 1978.

Plaintiff, injured in automobile collision with defendant insurer's insured, brought action against insurer for bad faith failure to settle with plaintiff. Insurer took consolidated appeals from final judgment against it entered in the Circuit Court, Dade County, Donald E. Stone, J., and from a posttrial order allowing plaintiff an attorney's fee. The District Court of Appeal, Pearson, J., held that: (1) evidence supported verdict against insurer, notwithstanding that insurer had a request from its own policyholder not to settle plaintiff's claim, especially in view of evidence of less than open-handed dealings with the insured, and (2) plaintiff was not entitled to award of an attorney's fee, absent assignment of insured's claim.

Final judgment affirmed and order allowing attorney's fees to plaintiff reversed.

1. Insurance —514.5(1)

Plaintiff, injured in automobile collision with defendant's insured, was entitled to bring action directly against the tort-feasor liability insurer for recovery of judgment in excess of policy limits based upon a claim

of fraud or bad faith on insurer in the conduct or handling of plaintiff's suit.

2. Insurance —514.5(2)

In action by plaintiff, injured in automobile collision with defendant insurer's insured, for bad-faith failure to settle with the plaintiff, evidence supported verdict against insurer, notwithstanding that insurer had a request from its own policyholder not to settle plaintiff's claim, expecially in view of evidence of less than open-handed dealings with the insured.

3. Insurance —514.5(1)

Under circumstances, injured plaintiff's action against tort-feasor's insurer for bad faith in refusing to settle a claim was maintainable notwithstanding that company has offered to settle for its policy limits prior to trial.

4. Insurance —514.5(4)

In action by plaintiff, injured in automobile collision with defendant insurer's insured, for bad-faith failure to settle with plaintiff, insurer's requested instruction concerning a party's right to recover damages flowing from consequences which that party could reasonably have avoided was inapplicable under evidence, since issue of whether bad faith had occurred prior to withdrawal of plaintiff's offer to settle for policy limits was clearly drawn.

5. Insurance —675

In action by plaintiff, injured in collision with defendant insurer's insured, for bad-faith failure to

settle with plaintiff, plaintiff was not entitled to award of an attorney's fee, absent assignment of insured's claim.

Blackwell, Walker, Gray, Powers, Flick & Hoehl and James E. Tribble, Miami, for appellant.

Sams, Anderson & Ward and Murray Sams, Jr., Miami, for appellee.

Before HAVERFIELD, C.J., and PEARSON, J. and CHARLES CARROLL (Ret.), Associate Judge.

PEARSON, Judge.

The first of these consolidated appeals is from a final judgment upon a jury verdict in an action against an insurance company by an injured plaintiff (who is not a policyholder of the insurer) for bad faith failure to settle with the plaintiff. The second is an appeal from a second judgment awarding the plaintiff attorney's fees in the same action. The principal issue presented on the first appeal is whether the evidence supports the judgment. On the second appeal, the issue is whether attorney's fees may be separately assessed by the court as an adjunct to the cause of action.

The evidence before the jury, viewed in the light most favorable to the verdict, is that on January 1, 1973, at approximately 6:00 p.m., Boston Old Colony's insured Brown, and appellee Gutierrez were involved in a head-on collision on West Flagler Street in Miami, Florida. At the time of the accident, Brown had an automobile liability policy with Boston Old Colony which provided liability coverage of $10,000 per person. An

unusual circumstance of the accident was that both Brown and Gutierrez claimed to have been proceeding east on Flagler Street and each claimed that the other car was headed west on Flagler Street, came over the center line and hit him head-on. There were three witnesses to the accident. All three of these witnesses gave testimony that Gutierrez was headed east on Flagler Street when Brown, who was traveling west, crossed the center line and struck Gutierrez's automobile head-on in his lane. Brown told George Heider, a senior adjuster of Boston Old Colony, that he was proceeding east on Flagler Street when the other automobile, heading west on Flagler Street, came over the center line and hit him head-on. Three witnesses provided by Brown to his insurance company gave statements supporting Brown's version of the accident. They lived in a trailer park two blocks west from where the accident occurred and said that Brown had been with them minutes before the accident when he drove out of the trailer park and headed east on Flagler Street. The investigating officer, after viewing the scene and interviewing the eyewitnesses, charged Brown with the accident.

Heider knew there was a question of liability despite Brown's version of the accident, and he so noted in his file. He knew that Gutierrez's injuries were serious and he noted in his file that Gutierrez was in South Miami Hospital in the intensive care unit. His condition was listed as critical. He also learned that Gutierrez had a fractured arm, thirteen fractured ribs, a fractured leg and was paralyzed from the waist down. Brown could not talk due to a tracheotomy. Although Boston Old Colony denied any liability to Gutierrez's attorney on January 9th and again on February 12th, Heider

had, in fact, set up a reserve of $9,500 on Brown's policy of $10,000. Heider had full authority to settle where there was a possibility of a verdict and a judgment in excess of the $10,000 policy limits.

On January 18th, at Heider's request, Boston Old Colony engaged a Mr. David Plummer, a trained professional accident reconstruction expert, to investigate the physical evidence and to render an opinion as to which car had been traveling east. After examining the accident site and the wrecked vehicles, a report was sent by Plummer to Heider on March 14th in which he discussed the physical evidence and gave his opinion that Brown was eastbound and Gutierrez was westbound on Flagler Street. He further concluded that Gutierrez was completely on the wrong side of the pavement at the point of impact. Brown reported to Heider that he had employed a personal attorney, Malcolm Kneale, and was planning to make, and later did make, a claim for his own injuries. Heider determined that because of the seriousness of Gutierrez's injuries and the conflict in liability testimony, he would offer to pay the $10,000 policy limits to settle the Gutierrez claim. Before making the offer to Gutierrez, Heider again talked with Brown. Although there was nothing in the policy that gave Brown the right to approve or disapprove the settlement, Heider consulted with him because Heider knew that Brown was represented by personal counsel and was going to make claim for his own injuries. During the conversation, Brown adamantly opposed offering settlement to Gutierrez even though Heider had warned him of a possible excess verdict. Heider asked Brown to provide Old Colony with a hold harmless letter. The hold harmless letter was prepared by Brown's attorney, Kneale, and was signed by Brown.

There was a conflict in the testimony between Kneale and Heider as to the circumstances leading up to the hold harmless letter. Accepting Kneale's testimony at the trial, it is that some time before the execution of the hold harmless letter, Heider had told him that Gutierrez had no liability insurance and that Kneale and Heider had discussed an uninsured motorist claim by Brown against Boston Old Colony. According to Kneale, Heider's position had been that Boston Old Colony would not "pay both ways;" that it would pay either the uninsured motorists claim or Gutierrez's claim, but it would not pay both. Kneale also testified that Heider told him that Brown's uninsured motorist claim would not receive favorable treatment unless the hold harmless letter was prepared and that he was relying on Heider to make immediate settlement under the uninsured motorist claim.

In actuality, Gutierrez had a liability insurance policy with Government Employees Insurance Company. On March 14th, Gutierrez's attorney wrote Heider offering to settle the claim against Brown and Boston Old Colony for the policy limits. On March 22nd, Heider wrote Gutierrez's attorney denying liability. Heider testified that he would, at that time, have paid the policy limits of $10,000 had he not obtained the hold harmless letter. On March 23rd, Heider sent Brown's attorney a copy of Gutierrez's attorney's letter of March 14th offering to settle for the policy limits.

Thereafter, suit was filed by Gutierrez against Brown and Boston Old Colony. Boston Old Colony engaged an attorney, George Lanza, to defend Brown and Boston Old Colony. Attorney Lanza reported that the case was bad and recommended settlement for the policy limits. Although Lanza was not asked for his opinion

on liability, he testified that if asked, he would have stated that without considering the damage factor, Gutierrez had a fifty-fifty possibility of recovery. On June 13th, Brown filed a claim against Boston Old Colony under the uninsured motorist provision of his policy. On July 11th, Heider wrote Brown's attorney that Gutierrez did, in fact, have insurance.

Kneale's law firm filed a counterclaim for Brown's damages in the collision. On November 13th, Gutierrez's attorney wrote Boston Old Colony a letter accusing it of bad faith and withdrawing the offer to settle for the policy limits. On December 27th, Brown settled his claim against Gutierrez's insurer for $5,000. Boston Old Colony, on January 2nd, offered to settle with Gutierrez for its policy limits. The cause between Gutierrez and Brown proceeded on the merits and the jury returned a verdict for Gutierrez in the amount of $1,418,350.16

[1] The present cause against Boston Old Colony was brought by Gutierrez charging bad faith in Boston Old Colony's refusal to settle his claim. Upon the law enunciated by the Supreme Court of Florida in *Auto Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938), and applied more recently in *Thompson v. Commercial Union Insurance Company of New York*, 250 So.2d 259 (Fla.1971), Gutierrez was entitled to bring the action directly against the tortfeasor liability insurer for recovery of the judgment in excess of the policy limits, based upon a claim of fraud or bad faith of the insurer in the conduct or handling of the suit.

Gutierrez's claim was fully tried before a jury. Extensive testimony was received and, except for the testimony of Brown, who was nowhere to be found, the facts set out were fully explored. The jury returned its verdict for Gutierrez in the amount of $1,418,350.16, with interest and costs. This appeal is from that judgment.

The appellant, Boston Old Colony, presents three points directed to the judgment. The first urges that Boston Old Colony should have been granted a directed verdict upon its motions because: (1) The insured, Brown, maintained at all times that he was not at fault; a position for which he had some evidence. (2) Brown's independent counsel prosecuted and recovered on a counterclaim against Gutierrez and expressly requested that the cause not be settled. (3) After the settlement of Brown's counterclaim against Gutierrez, Boston Old Colony offered to settle for its policy limits. Appellant's second point urges that the courts of Florida should recede from the holding in *Thompson v. Commercial Union Insurance Company of New York*, cited above, as the basis for Gutierrez's claim under Brown's insurance policy. The third point claims error upon the court's refusal to instruct upon the doctrine of avoidable consequences as requested by a tendered instruction based upon Boston Old Colony's offer to settle for its policy limits prior to trial. We do not discuss the second point because we find *Thompson v. Commercial Union Insurance Company of New York* to be governing.

[2] We hold that the record contains sufficient evidence to support the verdict even though Boston Old Colony had a request not to settle Gutierrez's claim from its own policyholder. We are impressed with the testimony that the policy between Boston Old

Colony and Brown left the insurance company free to exercise its own judgment as to settlement. Further, there is evidence which, if believed by the jury, could support Gutierrez's position that Brown's position and the hold harmless letter were procured without a full disclosure of facts known to Boston Old Colony. We realize that an insurer is ordinarily bound to act in accordance with the wishes and the best interests of its insured, see *American Fidelity & Casualty Company v. Greyhound Corporation*, 258 F.2d 709, 716 (5th Cir. 1958), and that it has a right to rely upon his expressed wishes concerning a settlement of his claim. In this case, where there was evidence of less than open-handed dealings with the insured, we think that the submission of the cause to the jury cannot be said to be faulty as a matter of law.

[3] The Third aspect of Boston Old Colony's argument for error upon the denial of its motions for a directed verdict presents the question: Is an action for bad faith in refusing to settle a claim maintainable when the company has offered to settle for its policy limits prior to trial? The jury in this case was fully informed of the offer to settle just prior to trial. The same jury found bad faith in the insurance company's dealing with its insured. The plaintiff-appellee, Gutierrez, claimed as a third party beneficiary under Brown's contract with the defendant, Boston Old Colony. The jury verdict must be interpreted as finding that the belated offer to settle, made only after bad faith had been charged and Gutierrez's offer to settle had been withdrawn, reasonably resulted in the excess verdict. We cannot now say that if bad faith had occurred, as the jury found, that this bad faith was, as a matter of law, wiped out by the belated offer to settle. Cf. the

principles of law in *American Fidelity & Casualty Company v. Greyhound Corporation*, 258 F.2d 709, 715-716 (5th Cir. 1958); and cf. *Government Employees Insurance Company v. Grounds*, 311 So.2d 164, 167 (Fla. 1st DCA 1975).

[4] Appellant's remaining point on its appeal from the final judgment urges that the trial court erred in failing to give a requested instruction.[1] No attack is made by appellee upon the wording of the instruction. The question is whether it was applicable under the evidence in this case. We hold that it was not because the issue of whether the bad faith occurred prior to the withdrawal of Gutierrez's offer to settle for the policy limits was clearly drawn. See *Garrison v. Hertz Corporation*, 129 So.2d 452 (Fla. 3d DCA 1961).

[5] We turn to the second of the consolidated appeals. This appeal is from a post-trial order allowing plaintiff Gutierrez an attorney's fee in his bad faith action. The appellee concedes that the subsequently-filed decision of the Supreme Court of Florida in *Roberts v. Carter*, 350 So.2d 78 (Fla. 1977), is governing and the award must be reversed because there was no assignment of the insured's claim.

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[1] "DEFENDANT'S REQUESTED INSTRUCTION NUMBER FOUR

"A party cannot recover damages flowing from consequences which that party could reasonably have avoided. If the insured or his counsel, by a reasonable exertion or care, could have prevented damages resulting to the insured by reason of the defendant's wrongful acts, it was his duty to do so, and so far as he or his counsel could have thus prevented the damages, the plaintiff cannot recover."

Accordingly, the final judgment is affirmed and the order allowing attorney's fees to the plaintiff Gutierrez is reversed.

SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 4, 1980

BOSTON OLD COLONY INSURANCE COMPANY,
Petitioner,

v.

RAUL GUTIERREZ,

Respondent.

CASE NO. 54,769

District Court of Appeal,
3d District — Nos. 77-508 & 77-761

Upon consideration of the Petition for Rehearing filed in the above styled cause by the attorney for Respondent,

IT IS ORDERED that said Petition be and the same is hereby denied.

SUNDBERG, C.J., OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur
ADKINS and BOYD, JJ., dissent

A True Copy

TEST:

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
(with copy for Circuit Judge)

Murray Sams, Jr., Esquire
James E. Tribble, Esquire

Sid J. White
Clerk, Supreme Court

By:_____
Deputy Clerk